In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1553

JOSEPH GREEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a nonjury trial in the Superior Court for the District of Columbia, petitioner[1] was convicted on 60 counts of fraudulent advertising in the District, in violation of 22 D.C. Code 1411. He was sentenced on each of Counts 1 through 57 either to pay a fine of $400 or to serve a term of imprisonment for 30 days; on Counts 58 and 59, to a fine of $400 and 30 days on each count; and, on Count 60, to a fine of $400 and a suspended sentence of 60 days. The District of Columbia Court of Appeals affirmed (Pet. App. 1a-7a; 312 A. 2d 788).

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[1]Although the caption refers to all defendants below as petitioners, the issues raised on appeal and in the petition involve only petitioner Green, who was the only defendant upon whom sentence was imposed, the other defendants being essentially trade names for petitioner Green. Accordingly, we shall refer only to petitioner Green.

A petition for rehearing was denied on January 21, 1974 (Pet. App. 12a). The petition for a writ of certiorari was filed on April 16, 1974. See 28U.S.C.2101(d), 2113; Rule 22(1) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

The facts are set forth in detail in the opinions of the Superior Court (App., *infra)* and of the Court of Appeals (Pet. App. 3a-5a), and are not in dispute. Petitioner inserted the advertisement in question in each day's edition of the *Washington Post* from February 1 through March 31, 1972, a total of 60 insertions of the advertisement. It stated that "Touch-N-Stitch" sewing machines were available for $63 at petitioner's place of business, "Freight Liquidators." At trial the government called several consumer witnesses. They testified that in response to this advertisement they had gone, for example, from their homes in the District of Columbia to petitioner's stores across the District line on Eastern Avenue in Silver Spring, Maryland, expecting to buy an operable sewing machine for $63, but had found that only the "head," *i.e.*, the motor and needle apparatus of a complete sewing machine, was available at that price and that the base and the foot pedal, needed to turn the machine on and off and to regulate the speed of the motor, could be obtained only at substantial additional expense.

The government also introduced in evidence the transcript of petitioner's voluntary grand jury testimony, during which he demonstrated and explained the operation of the head part of the sewing machine without the base and the foot pedal. At one point during the demonstration, when an odor pervaded the grand jury room, petitioner stated that the motor was overheating and conceded that the operation of the head in that manner was not good for the life of the motor, nor was

it a use contemplated by the manufacturer. Petitioner acknowledged responsibility for the advertising in question. In addition, he stated "that since we've been notified to come down here, we do not advertise the machine head only."

Petitioner did not testify at his trial. In his defense he called a Florida retailer who stated that he had travelled to Washington to observe petitioner's marketing techniques. During cross-examination the retailer stated that the sewing machine should not be operated without the base and foot pedal. Another defense witness testified that approximately 6 percent of petitioner's sales of sewing machines during the two-month period in question involved only heads.

1. The petition presents no question of national significance or general importance warranting a departure from this Court's traditional policy of not reviewing decisions of the highest court in the District of Columbia. *E.g., Del Vecchio* v. *Bowers*, 296 U.S. 280, 285. Rather, the case involves primarily the application of a provision of the District of Columbia Code to a particular set of facts. In any event, the court of appeals' decision was correct and is not in conflict with any decisions of this Court.

2. Petitioner's primary contention is that 22 D.C. Code 1411 reaches false advertising in the District of Columbia only if the advertiser also operates and sells the advertised goods in the District. However, neither the language of the statute nor its legislative history supports any such narrow interpretation, which would permit sellers of goods freely to flood the District with false advertisements and to victimize District residents, so long as the sale technically occurred beyond the District line.

Although Section 1411 specifically requires that the insertion of the advertisement in a newspaper be done directly or indirectly "in the District of Columbia" and that the newspaper be printed "in the District of Columbia," it does not require that the advertisement involve the sale of goods only in the District. Nor does the legislative history of the statute justify reading into it the territorial limitation petitioner proposes. There is no suggestion of a limitation to false advertisements for sales of goods only in the District.[2] On the contrary, the history shows that the provision of Section 1411 under which petitioner was convicted was "intended to punish the dissemination of fraudulent advertisements to the public * * * " (H. Rep. No. 169, 64th Cong., 1st Sess., p. 1), rather than the actual sale of goods resulting from such advertisements, and that Congress apparently anticipated that Section 1411 would apply to advertisements for matters likely to be sold outside the District. See generally *ibid.*; 53 Cong. Rec. 2521-2522.[3]

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[2] The intention of Congress in enacting Section 1411 in 1916 is in no way illuminated by its enactment in 1945 of a statute, on which petitioner relies (Pet. 11), authorizing the District government's Director of Weights, Measures, and Markets to purchase food in connection with the investigation and detection of sales of food by false advertising in violation of Section 1411. See 10 D.C. Code 124a. That statute did not reflect an attempt to be coextensive with Section 1411 and did not explicitly limit the Director to making purchases in the District.

[3] For example, when asked during the House debates whether Section 1411 would protect against advertisements for fake land schemes and mining stock, the draftsman of the bill, Representative Johnson, responded that its purpose was "to protect the public from false advertisements relating to any character of property through which the public was being robbed." 53 Cong. Rec. 2521.

Petitioner's argument based on the assertion that Section 1411 has not previously been enforced when the falsely advertised product could be purchased only outside the District is foreclosed by this Court's unanimous decision in *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100. There this Court held that a prosecution for violation of a regulation enacted by the short-lived Legislative Assembly of the District of Columbia in 1873 was not barred by the fact that the regulation had never been enforced and had arguably been repealed in 1901. As this Court observed, "[t]he failure of the executive branch to enforce a law does not result in its modification * * *." *Id.* at 113-114; see *id.* at 117.

3. Petitioner's contention that Sections 1411 and 1413 permit the imposition of only a single penalty upon his "course of conduct" was specifically considered and correctly rejected by the court of appeals (Pet. App. 6a-7a; footnote omitted):

> We also reject appellant's contention that there were not sixty offenses committed here but only one, because a course of conduct rather than the separate acts in such a course constitutes the conduct punishable under § 22-1411. Upon examination of both the legislative history and the statute, we find no reason for concluding that Congress intended to punish only a course of conduct.
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> Congress passed § 22-1411 with the intended purpose of preventing the dissemination of false advertising in the District of Columbia. In the accompanying House Report on the bill, the Committee on the District of Columbia stated "[i]t is believed that the title of the bill is sufficient to state the purpose of it without further comment," H.R. Rep. No. 169, 64th Cong., 1st Sess. 39 (1916), and the bill was entitled an act "to prevent fraudulent advertising in the District of Columbia."

If we adopt appellant's view, however, that only a course of conduct is proscribed under § 22-1411, we would frustrate rather than effectuate this congressional purpose. Unethical businessmen, for example, would be undeterred from engaging in false advertising in the District of Columbia for prolonged periods of time resulting in thousands of dollars in additional profit, if they knew that $500 was the maximum fine that could be imposed. A $500 fine would then become nothing more than a slight business expense. This is a result Congress obviously did not intend.

In addition, the language of § 22-1411 unambiguously prohibits each display of false advertising. § 22-1411 provides:

> It shall be unlawful . . . to insert or cause to be inserted in any newspaper, magazine, or other publication printed in the District of Columbia . . . *any false, untrue, or misleading statement, representation, or advertisement* with intent to sell, barter, or exchange any goods, wares, or merchandise . . . .[Emphasis added.]

There is nothing in the language of Section 1411 that speaks of a course of conduct. If Congress had intended to punish one for merely engaging in false advertising, it would have expressly so stated. It is apparent therefore, in view of the purpose and plain language of § 22-1411, that Congress intended to punish each publication of a false advertisement * * * [4]

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[4] Petitioner's speculations (Pet. 16-17) about the significance of a footnote in which the court of appeals observed that "[a]n entire edition of a newspaper, magazine, or book should be treated as one publication" (Pet. App. 7a, n.6), are beside the point, as here there has been no attempt to treat each copy of each day's newspaper as a separate publication. It is, in any event, the *insertion* of the false advertisement that is an offense, and each day's printing of a newspaper, would involve but a single insertion, regardless of the number of copies involved.

Petitioner's reliance (Pet. 17-20) upon this Court's decisions in *Ladner* v. *United States*, 358 U.S. 169, and *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218 is misplaced, for both cases involved the application of significantly different statutory prohibitions to factual situations having no pertinent resemblance to the instant case.[5]

Petitioner cites (Pet. 17) the provision in 15 U.S.C. 45 that "[e]ach separate violation" of a final order of the Federal Trade Commission is a separate offense, and that each day of violation "through continuing failure or neglect to obey" such order itself is a separate offense. That provision was intended to permit a separate civil penalty for each day of noncompliance with a Commission order, where the noncompliance resulted from a single act or a continuous course of conduct. It was not intended to permit only a single penalty for a series of

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[5]In *Ladner*, after analyzing the particular language and legislative history of the predecessor of 18 U.S.C. 111, which prohibited assault of or interference with federal officers in the performance of their duties, this Court concluded that the statute was ambiguous as to whether the unit of prosecution intended by Congress was the act of assault or interference, or the number of officers affected. 358 U.S. at 173-177. Applying the rule of lenity, this Court held that the act of firing a single gunshot constituted only a single violation, even though two officers were wounded by the shot. *Id.* at 177-178. In *Universal C.I.T.*, this Court held that, in view of (1) ambiguity as to whether the Fair Labor Standards Act (52 Stat. 1068, 1069, as amended, 29 U.S.C. 215, 216(a)) imposed criminal sanctions on the basis of each employee as to whom there was a violation, rather than the employer's course of conduct in mispaying a number of employees at the same time, and (2) legislative history showing that a proposal to impose criminal sanctions upon the former basis had been specifically rejected, the Act should be construed as penalizing only a course of conduct. 344 U.S. at 222-224. Here there is neither ambiguity nor legislative history favoring petitioner's construction of Section 1411.

separate violations of a Commission order.[6] In any event, the provision has no bearing on this case, where petitioner was not subjected to civil penalties, but to fines as punishment for multiple violations of a criminal statute.

4. The court of appeals did not err in failing to apply the rule of lenity used in construing federal criminal statutes (see Pet. 13-14, 19-20), assuming that that rule of construction still governs this Court's consideration of District of Columbia statutes that have been authoritatively construed by the highest court in the District of Columbia. Cf. 28 U.S.C. 1363; *Palmore* v. *United States*, 411 U.S. 389. Here, as in *Huddleston* v. *United States*, No. 72-1076, decided March 26, 1974, there is "no grievous ambiguity or uncertainty in the language and structure of" Section 1411; it "clearly proscribes petitioner's conduct and accorded him fair warning of the sanctions the law placed on that conduct." Slip op. p. 17.

5. Petitioner's final contention, that there was a material discrepancy between the court's oral sentence and that contained in the judgment subsequently entered (Pet. 20-25), is without merit. The court's oral judgment (quoted at Pet. 20-21) explicitly provided that, except for the suspended sentence on Count 60, "the rest of the sentence is consecutive" and "all counts [are] to run consecutive * * *." Accordingly, in imposing the specified sentence on "each count," with "[a]ll sentences to run consecutively," the judgment did not depart from the sentence pronounced in petitioner's presence.

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[6]Thus, the legislative history of the "continuing" penalty provision shows that under prior law one who violated an FTC order barring false advertising by engaging in a campaign of daily radio broadcasts would be subject to civil penalties of up to $5,000 for each day's advertisement, whereas one who violated an order by advertising on a billboard for a continuous period of time might be subject to only a single penalty. The "continuing" penalty amendment added in 1950 (64 Stat. 20) made daily penalties available in the latter situation. 96 Cong. Rec. 2974. The instant case is precisely analogous to the former situation.

In addition, 23 D.C. Code 112 provides that the sentence for an offense is to run consecutively to the sentence for other offenses unless the sentencing court otherwise provides. In any event, petitioner has made no post-judgment request to the sentencing judge to correct the alleged error, a course that will remain open even if this Court denies certiorari. See Rule 35(a), D.C. Super. Ct. Crim. R.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

APPENDIX

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

UNITED STATES OF AMERICA

v.

JOSEPH GREEN

MEMORANDUM ORDER

Criminal No. 34750-72

In this multiple-count indictment case, the Government alleges a pattern of false advertising in violation of D.C. Code provision, Title 22, Section 1411.[1]

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[1]Sec. 22-1411. Fraudulent advertising.

"It shall be unlawful in the District of Columbia for any person, firm, association, corporation, or advertising agency, either directly or indirectly to display or exhibit to the public in any manner whatever, whether by handbill, placard, poster, picture, film, or otherwise; or to insert or cause to be inserted in any newspaper, magazine, or other publication printed in the District of Columbia; or to issue, exhibit, or in any way distribute or disseminate to the public; or to deliver, exhibit, mail, or send to any person, firm, association, or corporation any false, untrue, or misleading statement, representation, or advertisement with intent to sell, barter, or exchange any goods, wares, or merchandise or anything of value or to deceive, mislead, or induce any person, firm, association, or corporation to purchase, discount, or in any way invest in or accept as collateral security any bonds, bill, share of stock, note, warehouse, receipt, or any security, or with the purpose to deceive, mislead, or induce any person, firm, association or corporation to purchase, make any loan upon or invest in any property of any kind; or use any of the aforesaid methods with the intent or purpose to deceive, mislead or induce any other person, firm, or corporation for a valuable consideration to employ the services of any person, firm association, or corporation so advertising such services. May 29, 1916, ch. 130, Sec. 1, 39 Stat. 165."

The defense has sought pre-trial dismissal of the action on varying grounds. Of interest is the challenge to the fact that defendant was indicted by a grand jury rather than charged by information as provided by statute.[2]

It has generally been held that misdemeanors may be prosecuted by indictment, *United States* v. *Knapf,* 180 F. Supp. 886 (D.C.N.J. 1960). More importantly, the question to be answered is whether defendant has suffered any prejudice or disadvantage in having this matter presented to a grand jury in lieu of information. This Court can find no prejudice; indeed it would appear that his rights were more fully protected.

At a non-jury trial the evidence showed that from February 1, 1972 through March 31, 1972, inclusive, advertising was published in The Washington Post Newspaper which offered sewing machines for sale by Freight Liquidators at a price of $63.00. The machines were described as being "Touch-N-Stitch" models capable of performing numerous sewing functions. Twenty-five year guarantees were stated.

The advertisements invariably represented a liquidation sale with drastic price reductions, of limited supply for a limited time.

The uncontradicted testimony of several purchasers was that, in response to the advertising, they were sold

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[2]Sec. 22-1412. Prosecution under section 22-1411.

"Prosecution under section 22-1411 shall be in the District of Columbia Court of General Sessions upon information filed by the United States Attorney for the District of Columbia, or one of his assistants. May 29, 1916, ch. 130, Sec. 2, 39, Stat. 165; Apr. 1, 1943, ch. 207. Sec. 1, 56, Stat. 190; June 25, 1948. ch. 464, Sec. 1, 62 Stat. 909; July 8, 1963, Pub. L. 88-60, Sec. 1, 77 Stat. 77."

the motor component of a sewing machine (often referred to as the "head"), exclusive of the base or foot pedal or any other means conventionally used to operate a sewing machine.

One witness stated she did not discover the deficiency until she inspected her purchase at home, she returned to the store and, at additional cost, obtained the necessary component in order to operate her machine.

Other witnesses stated they responded to the advertisement expecting to buy a complete machine and learned belatedly at the store that they would be required to pay additional monies for a complete operative unit.

Applying the standards of the statute to the circumstances of this case, it is seen that the Government must prove beyond a reasonable doubt that the defendant:

(1) Knowingly.

(2) inserted or caused to be inserted in a newspaper or publication in the District of Columbia,

(3) false, untrue or misleading statements or advertising,

(4) with intent to sell or barter goods or merchandise.

The defense contends that the evidence with respect to the insertion of the advertising into the newspaper is insufficient. It is true that the Government did not produce business records from the newspaper involved. However, the defendant admitted in hearings before the Federal Trade Commission that he was in charge of advertising in his business. More explicitly, in testifying before the grand jury, defendant unequivocally acknowledged his responsibility for the advertising under consideration. Defendant's own witness, Mr. Cunningham, testified that

defendant Green was the chief executive of Freight Liquidators and that he, himself, had come to Washington from Florida to observe his merchandising techniques. This chain of circumstances is compelling on this question.

Clearly the advertisements displayed to the public were misleading, untrue and false. In short, an operative sewing machine was advertised for sale, when in fact, only a component part was tendered for purchase.

In addition to the failure to produce the item advertised, the evidence showed a consistent and deliberate pattern —in all of the associated stores—of down-grading the advertised merchandise in favor of products not advertised.

Neither the warranty nor the instruction booklet extended by the manufacturer would be applicable to the "head" component of the machine as offered by the defendant. And, of course, it could not be safely operated as such.

Accordingly, the Court finds:

(1) That during the period alleged, the defendant knowingly caused certain advertisements to be inserted in The Washington Post Newspaper.

(2) That the advertising was false, untrue and misleading, in that, it purported to describe and offer for sale, a complete sewing machine unit, although no such unit was tendered for purchase at the advertised price; it was also misleading in that the true purpose of the advertisement was not to sell the merchandise advertised, but rather to sell items not advertised.

(3) That defendant utilized such false advertising with intent to sell certain goods to the public.

(4) That defendant did all of the above acts purposefully, deliberately, and intentionally.

It is concluded that the government has carried its burden and proven each element of the offense charged.

The defendant is found guilty as charged.

WILLIAM C. PRYOR
Judge

OCTOBER 4, 1972